IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 1ST FEBRUARY 2007 / 12TH MAGHA 1928

SA.No. 709 of 1996(A)

AS.56/1992 of ADDL.DISTRICT COURT, KOZHIKODE
OS.983/1989 of PRL. MUNSIFF COURT, KOZHIKODE-I

.....

APPELLANT:

---

1. BAYINTE MALIYAKKAL UMMATHABI,
D/O MAMMUKOYA HAJI,
AGED 53 YEARS, B.M.HOUSE, CALICUT-1

2. SUPPIKKAVEETTIL SAINABI,
D/O BEERANKOYA, AGED 55 YEARS,
S.V.HOUSE, SILK STREET, CALICUT-1

(BOTH IN NAGARAM AMSOM AND DESOM OF
KOZHIKODE TALUK)

BY ADV. SRI.A.A.ABUL HASSAN
SRI.V.M.KURIAN(JR.)

RESPONDENT:

M/S. KANJI MORARJI, REP. BY ITS
MANAGING PARTNER, KOYASSAN KOYA ROAD, CALICUT-1

BY ADV. SRI.T.A.RAMADASAN
SRI.ANIL THOMAS(T)

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 01/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J

S.A.No.709 of 1996

Dated this the 1st day of February, 2007

JUDGMENT

Appellants are the plaintiffs and respondent, the defendant in O.S.No.983 of 1989 on the file of Munsiff Court, Kozhikode-I. The suit was filed seeking a decree for permanent prohibitory injunction restraining respondent from demolishing the gates in the B schedule property, putting up new gates or other structures therein, altering the nature of the B schedule property or using B schedule property except the portion on the western side for the purpose of ingress and egress to the A schedule property. The respondent is admittedly the tenant of a godown in the plaint A schedule property. The way leading to the plaint A schedule property is through plaint B schedule property. There is a gate as entrance to the plaint B schedule property. Respondent attempted to put up a new gate removing the old gate. The suit was filed at that point, contending that respondent has no right to demolish the existing gate or to put up a new gate and the only right available to the respondent is to

use part of the plaint B schedule property as a way to the godown in the plaint A schedule property. Respondent in the written statement contended that the old gate has to be replaced for security of the godown and they sought permission of appellants and they permitted to change the gate and so appellants are not entitled to the decree sought for. It was admitted by respondent that respondent has only a right of way over plaint B schedule property to take articles to the godown. It was also specifically pleaded in the written statement that respondent has no intention to trespass into or reduce the plaint B schedule property.

2. Learned Munsiff on the evidence of PW1 and DW1, Exts. A1 & A2 and C1 & C2, dismissed the suit holding that there is nothing to prove that respondent attempted to construct the gate as claimed. Appellants challenged the decree in judgment before District Court, Kozhikode in A.S.No.56 of 1992. Learned Additional Sessions Judge on reappreciation of evidence found that respondent has no right to change the gate and respondent was not permitted to change the gate as claimed in the written

statement and the only right available to the respondent is to enter plaint A schedule property through B schedule property and that right does not clothe him with an authority to demolish the existing pillars or put up new structures. Learned District Judge relying on Ext. C1 plan and C2 report submitted by the Commissioner, found that plaint B schedule property has been cement plastered and a net has been drawn above the entire B schedule property and according to the respondent, respondent was stocking copra in the godown and using B schedule property for drying and grading the hill produces and the presence of the net in the B schedule property justifies the claim. Learned District Judge held that in such circumstances appellants are not entitled to prevent respondent from using B schedule property for the purpose of taking any vehicle to the godown for loading and unloading purpose and for drying and grading hill produces. A decree was granted as follows:

> “A decree is granted to the appellants restraining the respondent from demolishing any of the existing gates or pillars in the B schedule, putting up any new gate or other structure in it or altering the present lie and

condition of the B schedule, by a decree of permanent prohibitory injunction."

3. Appellants are challenging the decree to the limited extent contending that decree should have been granted as prayed for and the finding of learned District Judge that respondent is entitled to use plaint B schedule property for the purpose of drying and grading his hill produces is against the pleading as respondent has no such case in his written statement and the only right claimed in the written statement was a right to use the plaint B schedule property as a way to the godown. The substantial question of law formulated was whether first appellate court was justified in granting a relief to the respondent/defendant, without pleading and proof and whether the oral evidence of DW1 without pleading could be accepted.

4. The learned counsel for the appellants vehemently argued that there is an unambiguous admission in the written statement by the respondent that respondent has no intention to trespass into the plaint B schedule property or reduce the same into his possession and there is no pleading that plaint B schedule property was cement plastered by respondent or walls

have been constructed on the eastern and western boundaries of plaint B schedule property and a net was put up over the walls or that plaint B schedule property was being used for drying hill produces as found by the learned District Judge and evidence of DW1, which was not supported by pleading should not have been accepted and respondent should not have been permitted to use plaint B schedule property except for ingress and egress to the godown in the plaint B schedule property. The learned counsel argued that without appreciation of the pleading and evidence, first appellate court virtually granted a decree in favour of respondent by granting a decree in favour of the plaintiffs in part and permitting respondent to use plaint B schedule property for drying the hill produces and therefore that portion of the decree of the appellate court is to be set aside. The learned counsel for the respondent argued that Ext.C2 report establish that walls on the eastern and western side of the plaint B schedule property are having a height of more than six feet were constructed in the plaint B schedule property and a net was put over the walls and evidence of DW1 establish that the plaint B schedule property,

which was plastered with cement has been used for drying hill produces necessary in the godown in the plaint A schedule property and therefore first appellate court rightly did not grant a decree in favour of the appellants. It was also argued that respondent has been using plaint B schedule property as a drying yard for the hill produces.

5. As rightly pointed out by the learned counsel for the appellants, there is no pleading by the respondent that plaint B schedule property was being used for any other purpose than as a way leading to the godown in the plaint A schedule property. Respondent is admittedly the tenant of the A schedule property. Appellants are not disputing the right of respondent to use a part of plaint B schedule property as a way to the godown in the plaint A schedule property. In fact, right of respondent to use that part of the plaint B schedule property leading to the plaint A schedule property as a way was admitted in the plaint itself. When there is a godown in the plaint A schedule property and the only way leading to the plaint A schedule property is through plaint B schedule property, the case of respondent that

respondent is entitled to take vehicles through the B schedule property cannot be disputed. Learned District Judge rightly found that respondent is entitled to take vehicle to the godown through the plaint B schedule property and appellants are not entitled to a decree for injunction restraining respondent from doing so. That finding is perfectly in accordance with the pleadings, evidence and warrants, no interference.

6. But the question is whether respondent is entitled to use plaint B schedule property either as a drying yard or grading the hill produces except for taking vehicle to the plaint A schedule property. In the absence of a specific case in the written statement that the appellants or the predecessors permitted respondent to use plaint B schedule property as a drying yard or grading yard of hill produces or that respondent has been using the plaint B schedule property as a drying yard of the hill produces, learned District Judge should not have acted upon the interested testimony of DW1 to hold that respondent has got a right to use plaint B schedule property for drying or grading the hill produces. So also in the absence of pleading, on

the ground that when the Commissioner has inspected plaint B schedule property it was found enclosed by walls on the east and west and a net was found placed above the B schedule property, it should not have been found indicating a right to use the property other than as a way. The learned District Judge on the evidence should not found that it was constructed by the respondent or that respondent is entitled to use the plaint B schedule property except for using it as a way including for taking vehicles to the godown.

7. Learned District Judge did not grant a decree in favour of respondent. But, the finding in the judgment of learned District Judge providing a right to use plaint B schedule property is unsustainable. But as no decree was granted in favour of respondent, no interference in the judgment was warranted except clarifying the legal position. It is made clear that the decree granted by the learned District Judge is restraining respondent/defendant from demolishing the existing gates or pillars in the B schedule property, putting up a new gate or other structure or altering the present lie and condition of B

schedule property by a permanent prohibitory injunction. Respondent is only entitled to use plaint B schedule property, as a way inclusive of taking vehicles to the godown in the plaint A schedule property.

The Second Appeal is disposed of accordingly.

M.SASIDHARAN NAMBIAR,
JUDGE

csl